

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 28, 2013

Elisabeth A. Shumaker
Clerk of Court

In re: LEO D. GRAHAM,

Movant.

No. 12-3328
(D.C. No. 6:99-CR-10023-JTM-2)
(D. Kan.)

ORDER

Before **TYMKOVICH**, **EBEL**, and **HOLMES**, Circuit Judges.

On January 17, 2012, Leo D. Graham filed a motion for relief under Fed. R. Civ. P. 60(b) in District of Kansas Case No. 99-10023-02-JTM. Although the motion was styled as a Rule 60(b) motion, the district court determined that it amounted to a successive claim under 28 U.S.C. § 2255. Because this court had not authorized Mr. Graham to file such a claim, *see* 28 U.S.C. §§ 2244(b)(3), 2255(h), the district court transferred the case to this court for authorization.

Mr. Graham has now filed a motion asking us to remand this case to the district court. He also requests that we recall our mandate in a prior appeal affirming the denial of § 2255 relief. *United States v. Graham*, 312 F. App'x 79 (10th Cir. 2008). He argues that both the district court and this court have failed to reach a final disposition of one or more claims he raised in his original § 2255 motion. *See Peach v. United States*, 468 F.3d 1269, 1271 (10th Cir. 2006) (per curiam) (noting that “true” motion for 60(b) relief, which includes motion seeking a ruling on an omitted claim, is not a second or successive § 2255 motion).

Having studied his motion and the record in this case, we disagree with Mr. Graham. The claims he now seeks to raise have either been previously resolved or represent new claims for relief under § 2255. In either case, he fails to demonstrate that the district court incorrectly construed his Rule 60(b) motion as seeking to raise an unauthorized successive claim under § 2255. In addition, the motion to recall the mandate is itself subject to second or successive principles, *see Calderon v. Thompson*, 523 U.S. 538, 553 (1998), and Mr. Graham fails to either (1) demonstrate that this court did not previously resolve a claim raised in his original § 2255 motion or (2) satisfy the criteria to be granted authorization to file a second or successive motion under § 2255.

The motion for remand and motion to recall the mandate are therefore denied, and this matter is dismissed.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", written in black ink on a white background.

ELISABETH A. SHUMAKER, Clerk